

IN THE UNITED STATES BANKRUPTCY COURT
IN AND FOR THE DISTRICT OF DELAWARE

W.R. GRACE & CO., et al., : CHAPTER 11
Debtors : Case No. 01-01139 (JJF)
: Jointly Administered

Wilmington, Delaware
Thursday, May 3, 2001
8:00 o'clock, a.m.

BEFORE: HONORABLE JOSEPH J. FARNAN, JR., U.S.D.C.J.

APPEARANCES:

PACHULSKI, STANG, ZIEHL, YOUNG & JONES
BY: LAURA DAVIS JONES, ESQ.

-and-

KIRKLAND & ELLIS
BY: JAMES H.M. SPRAYREGEN, ESQ.,
DAVID BERNICK, ESQ.
JAMES W. KAPP, III, ESQ.,
SAMUEL A. SCHWARTZ, ESQ.
(Chicago, Illinois)

Counsel for Debtors

FRANK PERCH, ESQ.
OFFICE OF THE UNITED STATES TRUSTEE

Counsel for the United States Trustee

Valerie J. Gunning
Official Court Reporter

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per

1 APPEARANCES (Continued):

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3 BY: MATTHEW ZALESKI, ESQ.

4 -and-

5 CAPLIN & DRYSDALE
6 BY: PETER LOCKWOOD, ESQ.
(Washington, D.C.)

7 Counsel for the Official Committee of Asbestos
8 Personal Injury Claimants

9 MORRIS, NICHOLS, ARSHT & TUNNELL
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11 Counsel for National Medical Care

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13 BY: WILLIAM D. SULLIVAN, ESQ.

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15 LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
16 BY: THOMAS M. SOBOL, ESQ.

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21 FERRY & JOSEPH
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8 SKADDEN, ARPS, SLATE, MEAGHER & FLOM
9 BY: MARK CHEHI, ESQ.

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20 Counsel for Abner Asbestos Claimants

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24 JEFFREY GLATZER, ESQ.

25 Counsel for Counsel for Credit Lyonnais

1 APPEARANCES (Continued):

2 CONNOLLY, BOVE, LODGE & HUTZ
3 BY: JEFFREY WISLER, ESQ.

4 Counsel for Maryland Casualty

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P R O C E E D I N G S

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(Proceedings commenced in the courtroom beginning
at 8:00 a.m.)

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THE COURT: All right. Be seated, please.

19

Good morning.

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MR. SPRAYREGEN: Good morning. James Sprayregen
on behalf of the debtors. I assume your Honor has received a
copy of the agenda.

23

THE COURT: I have.

24

25

MR. SPRAYREGEN: Your Honor, with respect to
Items 1 through 5, there were no objections. We filed a

1 certificate of no objection and we propose to submit orders
2 to the Court.

3 THE COURT: We'll enter those orders.

4 MR. SPRAYREGEN: With one exception, your Honor.
5 There was a -- with respect to Item 3, I apologize, there was
6 an agreement with the Creditors Committee to continue that
7 matter for further discussion, so we won't be submitting an
8 order on that one yet. We may ask for a hearing on that if
9 we can't resolve it, whatever the next omnibus date is, which
10 we don't have yet.

11 THE COURT: So Item 3 will be continued by
12 agreement. The others are unobjected to and will be
13 entered.

14 MR. SPRAYREGEN: Thank you, your Honor.

15 Your Honor, with respect to Items 6 -- excuse
16 me -- with respect to Item 6, that was the ordinary course
17 professional motion. I understand, although I have not seen
18 it, that the U.S. Trustee, an objection that was filed
19 recently, or I'm not sure if it was a letter objection. I'm
20 not sure if the U.S. Trustee is here.

21 Ms. Jones is here.

22 (Pause while counsel confer.)

23 MR. SPRAYREGEN: Apparently, he's stuck in
24 traffic. Maybe we can pass that.

25 THE COURT: All right.

1 MR. SPRAYREGEN: Your Honor, Item 7 is the
2 interim compensation procedures motion. There were a few
3 comments from the Creditors Committee. We reached agreement
4 and we propose to submit an order on Item 7.

5 THE COURT: All right. We'll execute that.

6 MR. SPRAYREGEN: Your Honor, with respect to Item
7 8, deeming utilities adequately assured of future performance
8 and establishing procedure for determining adequate
9 assurances, there were a couple of comments we received from
10 the Creditors Committee and a couple of utilities. We worked
11 out all of those objections. We intend to propose an order
12 which details the resolution of those.

13 THE COURT: All right. We'll enter that order.

14 MR. SPRAYREGEN: That brings us to Item 9, the
15 preliminary injunction motion. Mr. Bernick from Kirkland &
16 Ellis will address that.

17 THE COURT: All right.

18 MR. BERNICK: Is your Honor's practice to hear
19 the motion first or hear the objection?

20 THE COURT: Have you been informed as to the
21 allocation of time?

22 MR. BERNICK: Yes. We, at the present time, will
23 not use our allocation. We maybe have 15 minutes at the
24 most.

25 THE COURT: Typically, in a bankruptcy

1 application, I would hear the objections first, but since
2 this is a motion for a preliminary objection, I'm going to
3 hear the applicant first.

4 MR. BERNICK: Okay. I believe, your Honor, that
5 we're down to a small number of issues. We have the
6 objection as to the -- the Abner plaintiffs. Excuse me.

7 I'm sorry, your Honor. The Abner case is
8 the case that's pending in California that involves the
9 fraudulent conveyance claim. And I think that the only
10 issue there is whether we're going to have collateral
11 litigation in California concerning the fraudulent
12 conveyance claim.

13 The fraudulent conveyance claim is barred, we
14 believe, in California, on four different grounds.

15 First, we have Section 360(a)(1), and 360 (a)(1)
16 concerns -- I'm sorry. 360(a)(1) would protect and stay
17 against claims that involve the -- a claim against the
18 debtor. Under Colonial Realty, that would be the first
19 ground for staying the California case. 368(3) is
20 alternative grounds for the stay, and 368(3) would also
21 kick in because we're talking about a claim that belongs
22 to the estate, and that would bring in the Mortgage America
23 case.

24 Then we have Section 105, because there are
25 indemnity claims that are implicated here. And the indemnity

1 claims would indicate the Robinson decision, which has been
2 adopted in the McCarney case.

3 We have Cybergenics. Under Cybergenics, the
4 Court would look to see if there's the authority that's
5 vested in the -- in the California plaintiffs to pursue the
6 fraudulent conveyance claim.

7 So this is a situation where the claim really has
8 four different -- there are four different problems that are
9 involved, whether you look at the state powers of the Court
10 or the preliminary injunction powers of the Court.

11 The issue today is whether not what actually
12 happens to that claim once it comes to rest. The issue today
13 is whether there should be the California collateral
14 litigation at all. And all that's before the Court today is
15 the pendency of the California case.

16 THE COURT: In that regard, the Abner attorneys
17 tell us in their papers that under bankruptcy law generally
18 and in the Third Circuit, the Court may authorize an
19 individual creditor or an official Committee to pursue a
20 fraudulent transfer claim where the cause of action has merit
21 and the debtors have refused to prosecute the action. And
22 that's in the context of their opening statement, that
23 although the debtors claim that the fraudulent transfer claim
24 belongs to the debtors, the law in the Third Circuit is clear
25 that a fraudulent transfer claim belongs to the creditors.

1 MR. BERNICK: Yes. That's the Cybergenics
2 decision.

3 THE COURT: Right.

4 MR. BERNICK: I think that we're going to get to
5 the question ultimately of how that claim should be pursued,
6 if it should be pursued.

7 THE COURT: How much time are you going to take
8 to get to that, to focus on that and provide some sort of
9 position?

10 MR. BERNICK: We can do that really -- I think,
11 in fact, the Bodily Injury Committee suggests 30 days. I
12 don't think we have a problem with that. It's a fairly
13 straightforward issue about the position that we're going to
14 take with regard to the prosecution of that claim. And so 30
15 days would be sufficient for us to inform the Court as to
16 what their position would be.

17 But the only matter we're really addressing here
18 today is whether it ought to be done in California, and our
19 position with regard to California is it should not happen in
20 California. That claim should be addressed, to the extent it
21 is addressed, here. So 30 days --

22 THE COURT: And I understand your position from
23 the papers. And your time frame is you can do that in 30
24 days?

25 MR. BERNICK: That's correct.

1 THE COURT: You agree with the Property
2 Committee?

3 MR. BERNICK: We agree with the Property
4 Committee. I think it's actually the Bodily Injury Committee
5 that has taken the position it ought to be 30 days, at least
6 with regard to the decision. I think that the Bodily Injury
7 Committee has a position that pertains to really all aspects
8 of the injunction. They are saying they want to continue it
9 for 30 days. We don't agree with that. But as to what
10 should actually take place in connection with the fraudulent
11 conveyance claim, we believe we'd be prepared to address that
12 in 30 days.

13 THE COURT: So if you were to prevail and have
14 the injunction entered and it had a time expiration of 30
15 days, you would not be back in asking for any additional time
16 on the issues that pretty much coat the -- the objections or
17 opposition?

18 MR. BERNICK: We wouldn't need any more time
19 to address the question of what should happen to the claim,
20 that's correct. But what we're asking for today, and what
21 we would seek not to revisit 30 days from now, is the
22 question of whether the claim should be -- should proceed
23 here or elsewhere. That is that we believe that it should
24 proceed here. The question of are we going to pursue the
25 claim and what should be the timing of the pursuit of the

1 claim, those are matters that we would seek to take up 30
2 days from now.

3 But we'd like the Court to enter the stay of the
4 California case as a stay that would be pendent throughout
5 the -- throughout these proceedings.

6 In other words, we would like not to revisit the
7 question of are we going to be traveling out to California to
8 pursue that claim. If the claim is going to be pursued, it
9 ought to be pursued here. And then the question is: Who
10 pursues it here, and on what basis it's pursued, the timing
11 for the pursuit of that claim.

12 Those are the matters that we would be prepared
13 to and would ask to take up 30 days from now.

14 THE COURT: And in your mind, is there really any
15 question, given what the pleadings were in the California
16 action, that you're going to come to the conclusion not to
17 pursue the claim?

18 MR. BERNICK: I think that insofar as Grace is
19 concerned, the debtor is concerned, given the positions that
20 we've taken, Grace, through its current counsel, would
21 probably be disabled from pursuing the claim. However, there
22 may be other ways in which -- we're very concerned that this
23 claim not become something that is a distraction from the
24 mainstream of this case.

25 Our case is -- has a whole lot of other issues to

1 be taking up that are important issues. And based upon other
2 experience, we're a little bit worried that this kind of
3 claim becomes, in a sense, what everyone starts to focus on
4 in the case as opposed to the matters that we really came
5 here to resolve, which are the liability matters.

6 From that point of view, it may be that,
7 candidly, one of the options is that Grace would retain new
8 counsel, special counsel, a special examiner type of counsel
9 who is independent of Grace and its existing counsel, paid
10 for by the debtor, but independent of the debtor, for
11 purposes of assessing and determining whether to pursue
12 fraudulent conveyance claim. That might be preferable.
13 There would be greater independence.

14 The claim is really being pursued in a fiduciary
15 capacity that is on behalf of all the creditors. That might
16 be a better course than to have, for example, one of the
17 creditors be in control of the claim, which is essentially
18 what the California plaintiffs asked for. They asked to be
19 in control of the claim.

20 There are others who may want to be in control of
21 the claim. There are a variety of cases that have been
22 brought, all of which make the fraudulent conveyance claim.

23 So rather than confer it upon one creditor or,
24 for that matter, one of the Committees of creditors, maybe it
25 makes more sense to have the claim pursued by somebody who

1 whose sole job it is, accountable to the Court as the
2 fiduciary, to determine whether that claim should be
3 pursued. That way there's more independence, there's more
4 accountability to the Court. It does not become a tool or a
5 lever in the hands of one creditor or one Creditors Committee
6 to pursue. Those are the kinds of things that we want to
7 think about and be able to report to the Court.

8 There are cases that, indeed, talk about the fact
9 that the authority, the Cybergeneics analysis as an analysis
10 says that the authority to pursue the claim is an authority,
11 really is conferred on the approval of the Court. It's an
12 authority that's a fiduciary one that's supposed to benefit
13 everybody who was involved in the case.

14 So there's an element of Court approval and
15 Court, really, supervision, ultimately, of how that claim is
16 pursued. That's why the leave has to be sought or approval
17 has to be sought by whomever it is that wants to pursue that
18 claim.

19 So we take that seriously. We say, Well, if
20 there's going to be Court approval and it's really a
21 fiduciary claim that's being brought, why not have it be
22 brought by somebody who's under the direct Court supervision,
23 not accountable to the rest of the Committee or to other
24 creditors, but to the Court directly, and independently of
25 all the parties to the case, to really see if the claim is a

1 worthwhile claim.

2 Obviously, our position has been historically
3 that it's not a meritorious claim, and that's why we
4 recognize that, ultimately, we'll probably be disabled from
5 pursuing it. At the same time, it does not seem to us to
6 make sense to have the claim then kind of get tossed up and
7 whatever creditor gets it or whatever Committee gets it,
8 that's how it proceeds.

9 So those are the alternatives that we're
10 considering.

11 THE COURT: All right.

12 MR. BERNICK: And sorry to be a little bit
13 confused at the outset here. I misplaced an important part
14 of my notes here. I apologize, your Honor.

15 I don't know if there are any questions that your
16 Honor has, other questions with regard to the Abner case.

17 THE COURT: I may have some on Price.

18 MR. BERNICK: Okay. Do you want to talk about
19 Price next?

20 THE COURT: Sure.

21 MR. BERNICK: Okay. With regard to Price, there
22 was an emergency motion with respect to Price. Obviously,
23 it's our position that there really is no emergency here.

24 The Price case is an MDL pending in Boston.
25 Nothing has happened with regard to that case beyond the

1 entry of case management order and the briefs that have been
2 filed in connection with class certification. There's no
3 class certification ordered. The CMO calls out a whole
4 series of activities that would take them until July of next
5 year. And so there's no mature trial imminent case that's
6 out there, which are the classic parameters of when you would
7 lift the stay.

8 More particularly, and there's a suggestion in
9 the papers that there's some other element of emergency, that
10 there's a need for warnings to go out or information to go
11 out or to protect the interests of the people in the Price
12 case.

13 That issue, that is, is there some kind of
14 emergency with respect to notification, already was litigated
15 in connection with the Barbanti class action in Washington
16 State.

17 Your Honor may recall or may not recall, the
18 Barbanti case has been certified as a statewide class in
19 Washington State, and there was a preliminary injunction
20 request, I believe, or request for emergency relief, to
21 notify people of the hazards of Zonolite. There was a
22 contested here -- evidentiary matters were presented to the
23 Court, and the Court there said that there was no need for
24 any kind of interim or preliminary notification. So there's
25 no element of emergency whatsoever with respect to Price,

1 none.

2 Price, in addition, presents a very fundamental
3 issue to this case, and, frankly, it's a -- we regard the
4 motion as something of an extreme motion. The whole purpose
5 of a mass tort bankruptcy in the first instance is to bring
6 all of the claims before one Court, all of the claims before
7 one Court, so they can be consolidated and dealt with on a
8 centralized basis. That's just basic mass tort bankruptcy.
9 That goes back to the Manville case.

10 That whole issue, that the Court have the power
11 to bring into one location all of the cases for centralized
12 proceedings, was extensively litigated in connection with the
13 Robbins case, because in Robbins, there are cases all over
14 the country. Judge Merage (phonetic), the trial judge there,
15 had them all transferred to the, I think it's the Eastern
16 District of Virginia. It was his courtroom in Richmond for a
17 consolidated proceeding. That went up to the Fourth Circuit
18 and was affirmed.

19 There was extensive discussion I know that
20 your Honor is familiar with about all the different grounds
21 for corralling all the cases in one location. That's the
22 case, that's the decision that went forward and talked about
23 the stay powers of the Court, the injunction powers of the
24 Court, and the importance of all those different powers to
25 bring to bear in one Court all the cases that were pending

1 elsewhere.

2 Again, centralization was the essence of what the
3 first part of the bankruptcy was all about.

4 And then we litigated the issue again in
5 connection with Dow-Corning. There was extensive litigation,
6 including involving the very firms that are involved in the
7 Price motion, in the case that's pending in Boston. And,
8 again, the Court, it went up and down to the Sixth Circuit on
9 two different occasions.

10 The Court was unequivocal in saying
11 centralization is the principal function that we have
12 to be acquitting here. Centralization is key. What the
13 Price request is all about is to say that even as to the
14 matters that are central to this Chapter 11, even as to those
15 matters, we're now going to have collateral litigation that's
16 pending in other courts to take up issues or discovery or
17 other matters of that nature. They're saying, Well, let the
18 Court in Boston consider class certification.

19 THE COURT: I thought you really thought what it
20 was all about was who was going to be running that litigation
21 for the plaintiff.

22 MR. BERNICK: That is the more -- we believe
23 that's also true, but I was -- that's kind of a more
24 political analysis. We think that is also true.

25 THE COURT: Okay. You put a line about it in

1 your papers.

2 If that's what it's really all about, what is the
3 harm to the estate to let that all occur up there, let them
4 fight out who's going to lead the case and then bring them
5 down here? I mean, what interest do you have in who, you
6 know, gets the benefit of a decision about being plaintiffs'
7 lead counsel or co-lead counsel or whatever?

8 MR. BERNICK: I'm sorry. If the only question is
9 who gets to represent the different creditors in connection
10 with the litigation that takes place here over what happens
11 to the Zonolite claim, that is a matter in which the debtor
12 does not have a particularly active interest.

13 THE COURT: May it actually be more efficient
14 to let that all preliminary kind of stuff take place up
15 there?

16 MR. BERNICK: I think if all that we're going
17 to do is to take that aspect of what's pending in Boston
18 and import it here, I believe it has already been done in the
19 sense that they already have their own Committee.

20 Now, I don't know whether the other folks, for
21 example, the people who have the Barbanti class in
22 Washington, are comfortable with that or whether, for that
23 matter, whether the body injury -- I'm sorry -- Property
24 Damage Committee itself is comfortable with that.

25 But if the only question is who is it that

1 participates in this proceeding --

2 THE COURT: It's not the only question. There
3 are some other preliminary questions that they tag on.

4 MR. BERNICK: They want to take on class
5 certification and discovery, which we feel very, very
6 strongly --

7 THE COURT: Right. Put discovery out. Call
8 that more than preliminary. The other kinds of things
9 they're talking about, what prejudice would be suffered if
10 the case eventually came here, in a combined form?

11 MR. BERNICK: No prejudice, except I struggle
12 with what it is that they've asked for that is only that.
13 That is, what they specifically ask for in their papers is
14 class certification and discovery. And class certification
15 is far more than who it is that represents those people.
16 That is, the whole substantive body of law and procedural
17 body of law that we think is fundamentally not the right way
18 to go and inconsistent with what we're here for.

19 Class certification --

20 THE COURT: So your answer is it's inconsistent
21 with the purposes of the filing?

22 MR. BERNICK: Absolutely. Let me just, again,
23 just put it all on the table.

24 Class certification, A, creates a lot of issues.
25 You know, is it a B(2) class, really, or is it a B(3) class?

1 It creates issues about what's the nature of the relief and
2 how is the case going to be tried. It's a whole process for
3 actually litigating the merits of the claim.

4 We're here in bankruptcy. There are separate
5 bankruptcy procedures that are involved in determining
6 whether a claim is going to be allowed or disallowed and
7 there's a process called the bar date process. The bar date
8 process, a date set, and people have to come in to say I've
9 got a claim that I want to have pursued. It's a completely
10 different type of procedure.

11 This is not a case, your Honor, in which there
12 are thousands of individual suits that are pending all over
13 the country. This is a case where there are a small number
14 of suits and they're all class actions. And essentially what
15 they would do is to create a huge body of claims by virtue of
16 the certification. The certification would be the creation
17 of the litigation in the first instance.

18 We don't think that there's any reason to do
19 that. We think, in point of fact, that's exactly what we
20 want to avoid here. What we want to have take place here,
21 let's find out the people, the individuals, who really want
22 this kind of relief to be begin with and let's do it
23 according to procedures that are used in bankruptcy, which
24 are the bar date procedures.

25 So you set a bar date, people lodge their claims

1 coming before the Court. At that point in time, if the
2 people who are currently representing the folks in the Boston
3 case are appointed, or, for that matter, we carry it over,
4 and they represent that group of claimants, we would have no
5 quarrel with that at all.

6 Our issue is not -- our issue is not the
7 particular individuals who are involved in the Boston case.
8 Our issue is the procedure that would be applied to
9 addressing the issues that are raised in Addafill (phonetic).

10 One of the principal reasons why we filed this
11 Chapter 11, and we wrote this in our brief to the Court, was
12 to address the Addafill case, and was to do it in ways that
13 were consistent and was done in accordance with the rules of
14 the bankruptcy process.

15 What they want to do essentially is to take what
16 is a mainstream issue in the bankruptcy and say, Well, let's
17 treat it the non-bankruptcy class action way, and then bring
18 it back into the bankruptcy. And it just does violence to
19 the whole idea of why we're here.

20 Again, we're not concerned about the political
21 situation. That is, however they resolve who's going to
22 leave is their business. We don't choose their lawyers. But
23 we're very concerned about the substance that seems to attach
24 to that. And that's why, if the Committees agree and those
25 people come in and, you know, they're the representatives,

1 that's fine. But class action, we would be very, very much
2 against any kind of class action procedure taking place
3 there, in part because Judge Zaras, no matter how good she
4 is, she's not the bankruptcy judge and she's not sitting in
5 bankruptcy and she's going to apply Rule 23 and look at this
6 as basically a piece of civil litigation. We just can't have
7 that. That's just something that would be very much
8 inconsistent with why it is that we're here.

9 So we feel very, very strongly about this issue.
10 It's not an emergency matter, but we feel very, very strongly
11 about the substance of this matter.

12 THE COURT: All right.

13 MR. BERNICK: Have I been responsive to the
14 Court?

15 THE COURT: Yes.

16 MR. BERNICK: Okay. The only other issues are
17 scope issues. And the scope issues I think have been
18 addressed in our papers.

19 Let me touch on, I think there are three small
20 issues on the scope. And if your Honor notes, we have
21 submitted a new proposed order to the Court in light of the
22 scope issues.

23 Number one, the Property Damage Committee. If
24 your Honor does not have it handy --

25 THE COURT: No, I do. I have it to my left

1 here. Go ahead.

2 MR. BERNICK: I've actually got a highlighted
3 copy here, your Honor (handing document to the Court).

4 THE COURT: Oh, if you have a highlighted copy.
5 (Pause.)

6 MR. BERNICK: If you take a look at the
7 highlighted portions, you'll see that there have been a
8 couple changes. The order that your Honor entered that
9 basically took us from day -- from the -- from the order that
10 was entered on the first day until this hearing partially
11 granted the relief that we requested on the first day. And
12 what we've done is to ask for the full relief of what we
13 asked for on the first day in certain areas less -- just
14 changed a little bit.

15 The first change is that if you go down to
16 Paragraph 9, it says, "The actions includes," and it ought to
17 be, "Action include, any case filed or pending."

18 The first day order also would cover cases that
19 haven't yet been filed, future claims. So that's a change.

20 And that was done really at the suggestion of the
21 Property Damage Committee. The Property Damage Committee
22 said why do we want to enjoin cases that have not yet been
23 filed, and we acceded to that. We were very skeptical and
24 remain very skeptical that that is going to be the end of the
25 matter because these cases kind of flow like a stream a

1 little bit, and if you dam it up at one part, they tend to
2 come through on another.

3 We expressed the concern if we don't put in
4 futures, all that will happen, they'll file new cases against
5 new entities or new cases against the same old entities. And
6 the most prominent example of this is with respect to Sealed
7 Air.

8 Remember, Sealed Air is a company with whom
9 the Grace Companies did a transaction in 1998. That was a
10 spinoff transaction. The Sealed Air, that's the 1996 spinoff
11 transaction. Those two companies are not debtors in this
12 case. However, there are indemnity claims that they have
13 with respect to any claims that are brought against them and
14 before this bankruptcy was filed, a whole series of claims
15 were brought against Sealed Air.

16 As the order presently stands the way that we've
17 worded it, the only thing that's enjoined are those claims
18 that actually have been filed against Sealed Air, actually
19 filed against Sealed Air.

20 We're concerned that if we don't say future or
21 may be filed, or yet to be commenced, that all of that will
22 mean is that new people will file claims. And
23 notwithstanding that concern, we've been conservative and
24 said simply filed or pending. Mayor we're wrong about that.
25 Maybe it ought to be broader so that we don't have to come

1 back here. Maybe the Sealed Air people will have something
2 to say about it.

3 But our approach here has been very
4 conservative. We're leery of it, but we don't want to ask
5 the Court for more than what we have to today. That's why we
6 styled it the way we did. So that's a change.

7 Number two, if you go down to Sub C under 9,
8 entities alleging fraudulent transfer, fraudulent conveyance
9 claims, those were denied. That relief was denied the first
10 day. Judge Newsome said that he was not familiar with the
11 fraudulent conveyance claims, didn't know enough to really
12 deal with them. I think there was a problem in how the
13 papers were conveyed to the Court.

14 But, clearly, we feel that that is warranted in
15 this case. We've set it forth in our papers, and the only
16 opposition to that comes from the Abner claimants in
17 California. But we've added that.

18 And then we've added the insurance carriers,
19 because there are direct actions that have now been brought
20 against two carriers, Maryland Casualty and Continental
21 Casualty down in Louisiana.

22 Louisiana has a direct action statute. Those
23 insurance companies are insurance companies that have already
24 reached agreements to provide coverage to Grace, and because
25 of that, there are now settlement agreements with them that

1 leave us in the position of indemnifying them.

2 So all that those direct actions do is to go
3 after us, essentially, standing in the shoes of the insurance
4 carrier who's got the indemnity. There's no more money to be
5 had there. We've already gotten the money. All it does is
6 implicate our indemnity obligation. We want to bring that to
7 a standstill.

8 Finally, if you put your eye up to No. 7, Merrill
9 Lynch, CFSB, Insurance Carriers and Robinson, we've added in
10 Merrill Lynch, CFSB. Those are two additional defendants in
11 the Abner case that we originally omitted to add. The
12 insurance carriers that picks up again, that same point that
13 we've made below. And then Robinson. Robinson is an
14 installer and licensee of Grace, been sued in Montana, and we
15 have an indemnity that goes to Robinson, so that we've added
16 them back in.

17 So we have narrowed the scope of the request to
18 make it non-future, and we've picked up some other parties,
19 and we've picked up a couple other claims. And in that
20 respect, we have refined the scope of the injunction. We're
21 comfortable with that.

22 I have to alert the Court that there may be some
23 cats and dogs out there. Maybe a couple more cases that are
24 pending. Probably not even asbestos cases, where Grace has
25 got indemnity obligations. We would hope we can reach

1 agreement with the other constituencies to include those in
2 at the appropriate point in time. But we'll let you know
3 if -- let the Court know if there are problems that way. But
4 those are the refinements that have taken place.

5 THE COURT: All right. Thank you.

6 MR. RASKIN: Your Honor, would you like to hear
7 from other people in support of the --

8 THE COURT: Yes. There's about five minutes
9 left, if you want to take that up as opposed to reserve it
10 for rebuttal. That's fine.

11 MR. RASKIN: Thank you, your Honor. I will be
12 brief.

13 Robert Raskin of Stroock & Stroock & Lavan an on
14 behalf of the Official Creditors Committee.

15 I just wanted to rise to question some of the
16 things that were just said by debtors' counsel. We do
17 support the injunction and we do support the full scope of
18 the injunction that was originally asked for. We are not
19 trying to bar any claims. There will be a bar date. Claims
20 will be brought.

21 It seems to us to be a mistake to leave a hole
22 open for people to flood claims through, although the debtor
23 has already reserved the right to come back. It seems like
24 if we're going to grant an injunction, it should be one that
25 accomplishes its goals and states the litigation.

1 What we do feel stronger about, your Honor, is
2 the response to the questions regarding fraudulent transfer
3 claims coming back in 30 days and the suggestion how those
4 will be brought and who will bring those.

5 Your Honor, this is a bankruptcy case. It's a
6 serious bankruptcy case. It's a complicated bankruptcy
7 case. There is no bar date as of yet, so we don't know what
8 the claims are likely to be.

9 The case just started. We don't know what the
10 value of the company is going to be, so we don't know whether
11 it will be necessary to bring fraudulent transfer claims or
12 not.

13 I suggest that, as most things in bankruptcy,
14 things tend to work out, hopefully, in a consensual matter.
15 To come back to this Court in 30 days and say, this
16 Committee, that Committee or this person should bring these
17 fraudulent transfer claims means one and only one thing:
18 That is the fraudulent transfer claims will be brought and
19 there will be litigation now.

20 We think that's a mistake. The debtor should be
21 given an opportunity along with the Creditors Committee to
22 try to work out the issues in this case, whether the company
23 is solvent, whether it can satisfy all the claims. And if
24 not, perhaps litigation does have to be brought and the
25 fraudulent transfer claims would be brought.

1 What our Committee does not want to see happen is
2 those fraudulent transfer claims be brought before we know
3 what this case is ultimately going to be about in terms of
4 what can happen in a plan of reorganization. We would be
5 severely prejudiced if those claims were brought right now
6 and a finding were made that the company were insolvent in
7 1996 -- excuse me -- solvent in 1996 or 1998 and those assets
8 would not be brought back into the estate whereas we find
9 ourselves now in an insolvent position.

10 I don't know whether those are the facts, but I
11 do know it's going to take some time for people to understand
12 these cases and a lot more than 30 days for people to
13 understand these cases, the values that are here, the claims
14 that are around in order to know whether those claims should
15 be brought or whether they can be consensually resolved in a
16 plan of reorganization, where the potential defendants
17 contribute to the assets of the estate, if necessary.

18 Those negotiations should have -- should happen
19 in the context of this bankruptcy and not -- not litigation
20 prematurely brought before we have an opportunity to see if
21 those negotiations can take place.

22 Lastly, your Honor, some mention was made of
23 having a third party coming into these cases as another
24 fiduciary to perhaps bring those claims.

25 At this point, as we said, we don't want the

1 claims brought, but we certainly don't want another fiduciary
2 adding another level of expenses in these cases. The debtors
3 are a fiduciary. There are three Official Committees, all of
4 who are fiduciaries, so I suggest to this Court that among
5 us, if the claims have to be brought, and we don't want them
6 brought now, that there are enough parties in interest in
7 this case with enough interests to bring those claims if and
8 when they should be brought.

9 Thank you, your Honor.

10 THE COURT: Thank you.

11 MR. CHEHI: Good morning, your Honor. Mark Chehi
12 of Skadden Arps on behalf of Sealed Air Corporation. I'd
13 like to move the admission of my partner from New York, Burt
14 Wolff, who would like to address the Court.

15 Sealed Air is a major creditor in the case, your
16 Honor, a major member of the Creditors Committee.

17 THE COURT: All right. Thank you. I will grant
18 the application. Thank you.

19 MR. WOLFF: Good morning, your Honor. Burt
20 Wolff, Skadden Arps, Slate, Meagher & Flom of New York for
21 Sealed Air Corporation.

22 Judge, the preliminary injunction order that is
23 before the Court addresses essentially two classes of cases.
24 The first are the fraudulent transfer matters and the second
25 can generally be swept under the rubric of product liability,

1 personal injury, property damage cases arriving -- arising
2 from alleged exposure to Grace's asbestos-containing
3 products.

4 Your Honor, it is essential that the stay gets
5 extended to future cases. The TRO that Judge Newsome issued
6 on April 2nd, which was subsequently extended by order of
7 this Court, covered not only pending actions, but also
8 actions that had not yet been filed or were not pending as of
9 the date of the order.

10 Until the submission of Grace's reply papers two
11 days ago, it had consistently been Grace's position that the
12 preliminary injunction should extend to future cases.

13 Since the time Grace filed this matter and the
14 TRO was issued on April 2nd, Sealed Air has been served with
15 20 new asbestos personal injury cases arising out of alleged
16 exposure to Grace's asbestos-containing products. Those 20
17 new cases are above and beyond the 30 cases that are
18 addressed in the affidavit of Katherine White, and I have a
19 list of those cases for the Court and counsel (handing
20 document to the Court).

21 Based on my conversation with a plaintiff's
22 asbestos lawyer, it is reasonable, and I -- maybe I'm
23 understating this, to expect an avalanche of hundreds,
24 if not thousands, of new cases to be filed if the
25 preliminary injunction does not extend to future cases.

1 Now, one of the key issues that concern all of
2 us is that of judicial economy. If the preliminary
3 injunction does not extend to future cases, then, given a 20-
4 day period within which to answer or move, it seems likely
5 that at least every two weeks we are going to be back before
6 this Court, asking first for a TRO, and then later for a
7 preliminary injunction with respect to these claims, even
8 though none of the underlying facts or circumstances will
9 have changed.

10 That is an unnecessary waste of judicial
11 resources and cost to the parties insofar as Sealed Air's
12 attorneys' fees are concerned with respect to those matters.

13 We have a claim for indemnity against Grace for
14 our fees.

15 It is in the compelling interest of judicial
16 economy to resolve this matter one time only, and that time
17 is now. We, therefore, urge the Court to issue the
18 preliminary injunction as it was initially requested to
19 cover future as well as current actions, whether fraudulent
20 transfer, and I understand that those fraudulent transfer
21 claims involve complex and weighty issues as well as for the
22 product liability-type claims.

23 Does the Court have any questions?

24 THE COURT: No. Thank you.

25 MR. WOLFF: Thank you, your Honor.

1 THE COURT: Thank you.

2 All right. The proponents have used their time.
3 We'll move to those in opposition.

4 MR. LeCLAIR: Lew LeClair on behalf of the Abner
5 plaintiffs.

6 Our position is that the motion of the debtor is
7 premature at this point. We are in agreement with the
8 Committees, at least the two Committees, the Bodily Injury
9 and Property Damage Committee, that there can be a stay for
10 30 days to enable them to determine where, when and how the
11 claim should proceed, the fraudulent transfer claim. We just
12 want to be sure that we preserve all of the options.

13 I think the debtors' motion seeks to terminate
14 the action in California before the Committees have an
15 opportunity to determine procedurally where and how they want
16 to move forward and to ask the Court for whatever permission
17 they want to ask the Court. Ultimately, we have not sought
18 leave yet to proceed on behalf of the Abner plaintiffs
19 because we want to cooperate with the Official Committees and
20 determine where they want to go and how they want to go.

21 So our position is ultimately that it's fine to
22 have a 30-day stay and to come back.

23 We will adamantly oppose an attempt by the debtor
24 to appoint some examiner to delay this claim, which we
25 believe is the most important issue. It's not a side issue;

1 it's the most important issue. Needs to be brought. Needs
2 to be brought promptly.

3 So that's going to be our position.

4 But we are perfectly willing -- we're not trying
5 to have a competing race to judgment among creditors. We
6 believe there ought to be a consolidated action. Our only
7 goal is to allow the Committee sufficient time over the next
8 30 days to determine exactly how procedurally they want to go
9 forward, because there may be procedural reasons they choose
10 to intervene our action as opposed to filing an independent
11 action. They may want to be here. The Court may want to
12 have it here. All of that is perfectly fine once there's an
13 opportunity to have that determination made.

14 So ultimately I don't think today is the day for
15 the battle about where and how this should go forward. But
16 we don't think the Court, and we'd implore the Court not to
17 enter an order that prohibits further actions in California
18 should the Committee decide that's ultimately what they want
19 to seek leave from the Court to do.

20 Thank you, your Honor.

21 THE COURT: All right. Thank you.

22 MR. SULLIVAN: Good morning, your Honor. Bill
23 Sullivan from Elzufon Austin, on behalf of Paul Price and the
24 Zonolite litigation plaintiffs.

25 My office filed motions pro hac vice for Robert

1 Fishman and Robert Sobol Tuesday. I would request that they
2 be admitted so they can address the Court.

3 THE COURT: Thank you. Your application will be
4 granted. Welcome.

5 MR. SOBOL: Good morning, your Honor. Thomas
6 Sobol of Lief, Cabraser, Hiemann & Bernstein.

7 MR. FISHMAN: Robert Fishman of Shaw, Gussis,
8 Domanskis, Fishman and Glantz in Chicago.

9 MR. SOBOL: Your Honor, I believe that Mr.
10 Bernick addressed two issues. Let me first address the issue
11 with respect to the injunction. Our opposition was in a
12 limited opposition with respect to the injunction. The
13 injunction would have enjoined the Price plaintiffs from
14 litigating the MDL case against Sealed Air on the merits in
15 addition to litigating an issue with respect to the
16 fraudulent conveyance.

17 Because we did not want this Court to be issuing
18 an injunction without recognizing that there are additional
19 issues vis-a-vis the MDL and the potential likelihood or
20 possibility of litigating on the merits issues in the MDL, we
21 filed the objection. The specific request, then, that we
22 would ask be taken care of vis-a-vis the injunction is simply
23 that the injunction only go so far as not to enjoin the
24 parties from litigating cases that have -- that are the
25 subject of any order that this Court may enter with respect

1 to relief from the automatic stay.

2 If this Court were to issue the relief we've
3 requested vis-a-vis the automatic stay, then, by the same
4 token, the injunction, if you will, is lifted as to Sealed
5 Air and the issues that have been within the scope of the
6 automatic stay, those issues that have been lifted vis-a-vis
7 the automatic stay would similarly be listed vis-a-vis Sealed
8 Air.

9 Sealed Air does have the right to defend the
10 Zonolite case in Boston on the merits, if that case is going
11 forward, and we would not want there to be some kind of
12 technical glitch there. That's the limited nature of our
13 objection vis-a-vis the injunction.

14 Now, Mr. Bernick for Grace has, in essence,
15 argued the merits of the automatic stay. I guess I ask the
16 Court right now whether you'd like us to address those
17 arguments now or wait until later on in the agenda, where you
18 have Item No. 13, the automatic stay issue.

19 THE COURT: Why don't you address it now.

20 MR. SOBOL: Okay. And I also note there
21 was something about time limitations. I want to make sure
22 I don't take too much of the Court's time. I'm not trying
23 to --

24 THE COURT: Each side was allowed, in addition,
25 to present 30 minutes total, with the understanding that we

1 read the papers that were presented. It's an opportunity
2 to focus on what you might want to focus on or to respond
3 in some way in greater detail to what the other side said.

4 MR. SOBOL: Sure. 30 minutes is not going to
5 be necessary, I don't think, unless my brother takes up --

6 THE COURT: No. That's the total for everybody.

7 MR. SOBOL: Right. I understand that.

8 I think it's important to have a very brief
9 background regarding the facts and the prior proceedings in
10 order to be able to hit the really germane and practical
11 issues, which are, first, whether the class certification
12 issue, Judge Zaras should be permitted to conclude the
13 process that was under way vis-a-vis that.

14 Second, also to address the practical question
15 vis-a-vis the discovery issue that we've raised.

16 And because my points with respect to both of
17 those rely somewhat and my response to Mr. Bernick relies on
18 a couple background facts, I would like to simply outline
19 those.

20 For a couple of decades or more, W.R. Grace,
21 on its own, manufactured and distributed throughout this
22 country Zonolite attic insulation, a loose fill attic
23 insulation, which turns out can, and frequently does, under
24 certain circumstances, release fibers when disturbed that
25 are -- exceed appropriate thresholds.

1 That loose fill attic insulation exists all
2 throughout this country in likely tens of thousands, if not
3 hundreds of thousands, of homes.

4 Attic insulation became the subject of litigation
5 recently, in the past year or a couple of years, has been the
6 subject of extensive proceedings in the State of Washington
7 and a small handful of other class action cases.

8 In the Barbanti case, which is now a statewide
9 Washington case, has been certified by the Washington State
10 Court Judge, and residents in the State of Washington, people
11 who have Zonolite attic insulation in their homes, many be
12 receiving notice crafted by the parties and the Court
13 regarding what Zonolite attic insulation is, what it looks
14 like, the potential hazards that it may or may not have and
15 the existence of the class action case.

16 This kind of litigation is markedly different
17 than the kind of bodily injury or traditional property damage
18 cases that have been litigated throughout this country and
19 have been the subject of cases that have made their way to
20 the Supreme Court, that have had a lot of litigation.
21 Zonolite is markedly different. It's not only a property
22 damage case, it's a case that's largely equitable in nature.
23 It tries to educate people not merely by notice to proposed
24 class members, but also seeks to afford equitable relief in
25 the form of creating funds by which a fund can further

1 educate people regarding the damage that may or may not be
2 caused by this, to help, and also to create funds that if
3 people do have to disturb or shore up their attics so that
4 this loose attic insulation does not get disturbed, that
5 those funds can be available.

6 This case, the MDL, was the product of the usual
7 judicial panel, and W.R. Grace strenuously made the pitch
8 that the best plays for the rights for this claim to be
9 fashioned, the adversarial process, for us to figure out
10 whether or not this is an important issue for Americans, that
11 W.R. Grace manufactured and distributed to households
12 throughout this country this potentially dangerous product,
13 and how this society, and the responsibilities that W.R.
14 Grace will have with respect to that problem, is an issue
15 that should be adjudicated in a Court.

16 And W.R. Grace and certain parties may be -- took
17 the view that it should be consolidated for efficiency
18 purposes in the District of Massachusetts before an MDL judge
19 there, where that occurred.

20 And for the past several months, we've banged out
21 a CMO in which Judge Zaras plans to try the case, if it needs
22 to be tried, next year, in June, and she set a schedule of
23 events, including a Daubert hearing that she would have and
24 summary judgment issues that she would address toward the end
25 of this year and early next year, that fashioned and deal

1 with this issue.

2 Knowing that Judge Zaras was going to have a
3 hearing about a week ago, and this April W.R. Grace filed
4 this bankruptcy petition in early April. And they make no
5 bones about what the purpose, from their point of view, that
6 this bankruptcy is. They don't ever want there to be a class
7 certification process because, from W.R. Grace's point of
8 view, it is litigants and lawyers that create the problems,
9 not W.R. Grace.

10 And Mr. Bernick has made no bones about it: That
11 if there is ever a class certification process, it would, he
12 says, create litigation.

13 Well, I would suggest that it's not litigants who
14 are creating the litigation and the problems. It's obviously
15 W.R. Grace and its distribution of the product over the
16 years. And then the question is: How is society is going to
17 address it?

18 Very simply, then, there are two practical issues
19 and one nonissue. I've heard from Mr. Bernick, and
20 apparently there's some suggestion in the papers somewhere
21 which frankly has escaped me. There may be some feud as to
22 who the lawyers are that are going to litigate this claim and
23 that kind of thing.

24 I will tell you I know of no issues with respect
25 to leadership whatsoever. There's a leadership structure in

1 place endorsed by Judge Zaras up in Boston. In this court,
2 there are Creditors Committees in which Barbanti is a
3 Zonolite plaintiff, is a member of the Property Damage
4 Committee, and in Price is a creditor who presumably and
5 realistically is represented through that Committee. There
6 are no issues regarding leadership, at least that I'm
7 personally aware of. There are, however, two immediate
8 issues that we do think are appropriate.

9 First, to have class certification heard before
10 Judge Zaras. It's a discrete issue. It's an issue that has
11 been briefed. It's ready to go. It's where W.R. Grace and
12 the parties thought was the best place to address this
13 issue. And it is -- you've read the balance of the papers,
14 so I think that it's well within the case law.

15 There's nothing in the case law that says
16 asbestos is an exception and we never grant relief from the
17 automatic stay. It's an asbestos case, which is essentially
18 W.R. Grace's view. It's not what the law says. The law says
19 differently, and we've made -- we've stated to this Court
20 what the law is.

21 I will also say this, your Honor: As a practical
22 matter, there will be a need to recognize what Grace wants to
23 do here. What Grace would like to do in this bankruptcy
24 process is curtail the process of realistic education for
25 American citizens regarding the existence of this problem.

1 And it would like to in some way not have class certification
2 go forward somewhere, whether it's in Boston or here,
3 truncate the notice process to the extent that it can, within
4 certain marginal limitations, try to have a discrete number
5 of individuals who may have some particular heightened
6 awareness of Zonolite problems fall through the cracks and in
7 some way address that handful of people. Terminate the
8 bankruptcy and leave behind for society and for people the
9 problem of Zonolite attic insulation.

10 We don't think that's an appropriate way to go.

11 Finally, as to what has gone on in the MDL, there
12 has been a considerable amount, although, to be sure, it
13 hasn't been pending there for a long period of time. The
14 Court has heard the parties, does have a schedule of events
15 in terms of how to fashion and address this issue. There has
16 been an enormous amount of discovery undertaken within a very
17 short period of time, including a dozen or more lawyers who
18 have done discovery.

19 So having said all of that, I just think that we
20 would rest on the brief and what my brother, Mr. Fishman, has
21 to say.

22 THE COURT: Thank you.

23 MR. FISHMAN: Your Honor, I have very limited
24 comments.

25 I think it has been interesting for me to listen

1 to the debtor advise the Court about what the playing field
2 is supposed to look like, what order things are supposed to
3 happen in, and who gets to decide the order in which they
4 happen.

5 Your Honor, I'm a very experienced Chapter 11
6 lawyer. I know that it's always the debtors' job to try to
7 organize the case in a manner that most suits the debtors'
8 goals. However, that's not the Court's job, and the parties
9 are not bound by the' debtors vision of the case.

10 The most compelling issue before the Court with
11 respect to the Zonolite claimants, your Honor, is not what
12 relief they're going to be entitled to. It's not how much
13 money they are going to get or when they are going to get it
14 or how they're going to get it. It's who are they, because
15 these claimants don't know they have claims.

16 And the claims bar date process with a typical
17 mailed notice to known claimants and a published notice in
18 the Wall Street Journal and wherever else the parties might
19 contemplate publishing a notice is not going to reach the
20 claimants. They're not going to know that they even need to
21 come forward.

22 I consider myself to be a relatively
23 knowledgeable person, aware of what's going on in the world
24 around me, and I don't think I ever even heard of Zonolite
25 until approximately three months -- excuse me -- three weeks

1 ago. I don't know if I have Zonolite in my attic, and after
2 what I read in these papers, I'm not particularly inclined to
3 go up there and look.

4 One of the big issues that we have here, your
5 Honor, is we have to design a system that is certain that it
6 does not disenfranchise these people from participating in
7 this case.

8 The debtor has suggested that the merits of these
9 claims are not high, and that in the end, they'll prevail,
10 and they won't be required to pay anyone any money. That may
11 or may not be true. I really don't know if that's going to
12 be true.

13 But the most important thing that this process
14 has to ensure is that all of these people become aware of
15 this potential claim that they have, have a meaningful
16 opportunity to appear before the Court, whether it's this
17 Court or the Court in Boston, or a Court somewhere else,
18 present their claim, and have it adjudicated.

19 And the process that the debtor has outlined and
20 the one that the debtor hopes it can persuade this Court to
21 follow is one which I believe, your Honor, is designed to
22 prevent exactly that from happening.

23 We think that the essential ingredient for making
24 sure that these claimants have a meaningful opportunity to
25 participate in this case is for the class certification to be

1 allowed to go forward so that, hopefully, assuming that, from
2 our standpoint, that a class certification effort is
3 successful, that one person can stand before this Court,
4 speak for these claimants and act for these claimants so that
5 their potential claims are not left behind because they don't
6 even know they have them.

7 We think, your Honor, that's the essence of the
8 cause for lifting the stay, to allow the certification to go
9 forward, and we are not asking today for this Court to let
10 the merits of this claim be decided in Boston. We may or may
11 not come back in the future and ask for that. But we're not
12 asking for it today. We do think that the Court in Boston is
13 poised to act. We think that it would be a waste of the
14 resources of the parties and the Court to start all over
15 again here.

16 And if your Honor was not inclined to allow class
17 certification to go forward in Boston, we would immediately
18 bring that issue before your Honor and ask your Honor to deal
19 with it.

20 So in our view, someone is going to deal with
21 this issue at some time, and it makes sense for us, for the
22 Court that was in the middle of dealing with it, to continue
23 dealing with it instead of starting all over again here.

24 Your Honor, those are my comments. Thank you.

25 THE COURT: All right. Thank you.

1 Does anyone else want to be heard in opposition?

2 MR. BAENA: May it please the Court, Scott Baena
3 on behalf of the Official Property Damage Claimants
4 Committee.

5 Good morning, your Honor. I will try to make it
6 brief and not be repetitious.

7 We, obviously, are opposed to the debtors'
8 motion. We've objected to it. We have apparently, however,
9 reached some common ground. There appears to be no
10 disagreement any longer that this litigation ought to be
11 consolidated. There appears to be common ground that the
12 litigation against Sealed Air and Fresnias is a claim of this
13 estate. And despite the presentation of the Official Trade
14 and Bank Committee counsel, this litigation, in fact, will be
15 a centerpiece for some time, I suspect, of this bankruptcy
16 proceeding.

17 So the real question, I think, that emerges, and
18 as I think the Court has already perceived, is where this
19 litigation will be prosecuted and by whom.

20 Let me start with by whom. The notion of
21 a special prosecutor or an examiner is, we think,
22 respectfully, your Honor, just another device or
23 attempt to disenfranchise the real parties in interest in
24 this litigation. Indeed, as described by counsel for the
25 debtors just a few moments ago, he has presented a virtually

1 unworkable mechanism for the appointment and for the process
2 of a special prosecutor.

3 It puts the Court in an untenable position of
4 conceivably being the trial court as well as the body that
5 is with authority to supervise the special prosecutor in
6 determining whether or not to bring an action, which we think
7 is irrefutably an action that needs to be brought by this
8 estate.

9 The point is we think irrefutable that the
10 existing litigants and the Committees are not only the
11 appropriate parties, but the parties most capable of
12 prosecuting this action.

13 And if it is appropriate to rule upon that today,
14 we would urge the Court to disenfranchise the debtor, in
15 essence, from making any determinations about how and when
16 this litigation will be brought in the face of its positions,
17 which are wholly inconsistent with the notion of even
18 bringing this litigation, as they have already conceded to
19 their credit.

20 With respect to the argument of Sealed Air, that
21 notwithstanding the debtors' agreement with the Property
22 Damage Committee that future suits ought not be enjoined by
23 this Court at this point in time, Sealed Air, of course, says
24 you ought to do so.

25 The fact that the debtor has agreed with the

1 Property Damage Committee that you ought not and cannot at
2 this juncture, preliminarily or otherwise, enjoin future
3 litigation underlines any basis whatsoever for Sealed Air to
4 come in here and argue otherwise, because the only
5 conceivable and legitimate basis for extending, in effect,
6 the automatic stay or other injunctive relief akin to the
7 automatic stay is the effect it would have on the
8 reorganization of this debtor.

9 If the debtor has come to the conclusion that
10 that litigation can be filed and will address it at a later
11 time without affecting its ability to reorganize, it's
12 virtually a legal impossibility for Sealed Air to take a
13 different position.

14 Finally, your Honor, if I may comment on the
15 Price limited objection to the relief sought by the debtor,
16 as I understand it, Price is merely seeking to ensure that
17 it preserves its right at the appropriate time, maybe today,
18 to obtain relief from the automatic stay to do just two
19 things: The first is to seek class certification and the
20 second is to conduct discovery in connection with that
21 certified class.

22 Your Honor, to provide a different bankruptcy
23 perspective and propriety and the appropriateness of granting
24 Price that limited relief, I think we ought remember that the
25 bankruptcy purpose of class certification is to enable a

1 class claim to be filed in this case.

2 The debtor has made it clear from the outset of
3 this case, through it's informational brief, through its
4 comments to this Court, that it is going to attempt to
5 prevail upon this Court to create a series of bar dates. In
6 the case of Zonolite attic insulation, a separate bar date.
7 They ambiguously refer to whether or not it will be before or
8 after other bar dates, but the point is they're going to seek
9 a special bar date with respect to Zonolite attic
10 insulation.

11 If class certification does not occur, there are
12 tens of thousands, if not hundreds of thousands, of class
13 members, as we have already heard, who will have no
14 opportunity, let alone knowledge of the existence of that bar
15 date and the ability to comply with that bar date.

16 I think that the whole tactical intent of the
17 debtor is to accomplish just that: To eliminate those
18 hundreds of thousands of claims through a procedural
19 device of shortening in the first instance the bar date
20 and, secondly, prohibiting anybody from certifying the
21 class.

22 We think that that undermines the legitimate
23 claims and interests of persons within the constituency
24 of the Property Damage Committee, and that the Court would
25 not allow that to occur.

1 Thank you, your Honor.

2 THE COURT: All right. Thank you.

3 MR. ZALESKI: Good morning, your Honor. Matthew
4 Zaleski, Ashby & Geddes, on behalf of the Asbestos Injury
5 Personal Claimants Committee. I'd like to introduce to the
6 Court and move the admission pro hac vice of Peter Lockwood
7 of the Caplin & Drysdale firm.

8 THE COURT: Thank you. Your application is
9 granted.

10 MR. LOCKWOOD: The Bodily Injury Committee,
11 your Honor, I guess we're winding up. We've consolidated
12 two agenda items here, if I understand the argument. One is
13 the injunction and the other is the lift/stay in the Price
14 case.

15 With respect to the injunction, the Bodily Injury
16 Committee's of the matter is that the only appropriate
17 solution at this point that would allow, on one hand,
18 preservation of the status quo and on the other hand, the
19 various parties that you've heard from today, many, if not
20 all of whom, have divergent views about how the fraudulent
21 conveyance action should proceed, a reasonable opportunity to
22 see if there could be some sort of agreement on that subject
23 and, if not, at least an orderly presentation of the
24 different proposed solutions.

25 Certainly, the Bodily Injury Committee disagrees

1 strenuously with the debtor, that the fraudulent conveyance
2 claims are side issues. We agree with the Property Damage
3 Committee that they are, indeed, central issues. Even using
4 the debtors' own financial information that's in its
5 information brief and its previously filed SEC documents, the
6 amount of the assets and the value of the assets of the
7 debtor conveyed away in 1996 and 1998 dwarf the value of the
8 assets remaining.

9 The Bodily Injury Committee is confident that the
10 value of the assets remaining are also dwarfed by, at a
11 minimum, the asbestos personal injury claims.

12 Certainly, there are a lot of property damage
13 claims, particularly the Zonolite attic insulation claims,
14 that are going to have to be addressed as well. Certainly as
15 alleged, they also dwarf it.

16 And we believe that, sooner or later, there is
17 going to have to be a decision to go forward with these
18 fraudulent conveyance claims unless, for some reason
19 presently unknown to us, everybody should decide that they're
20 not worth pursuing.

21 We also agree with the Property Damage Committee
22 and with Mr. LeClair, that the idea of appointing some sort
23 of neutral third party to process these claims is nothing but
24 a desperate effort to try and get somebody in here that the
25 debtor could lobby to attempt to convince that it wasn't in

1 the interests of the estate.

2 The estate has three official representatives:
3 The three Committees. And that's -- and this proposed
4 representative wouldn't have a client. I mean, normally,
5 when lawyers make decisions about whether to pursue
6 litigation costs, benefit analysis and the like, they discuss
7 it with a client.

8 Mr. Bernick has conceded that his client, the
9 debtor, is disabled. He apparently envisages the Committees
10 as inappropriate clients. So I guess that means he doesn't
11 mind making your Honor the client, because I don't know who
12 else this professional would discuss the merits of the
13 litigation with, and that is wholly inappropriate on its
14 face.

15 The idea of an examiner is the examiner would not
16 solve anything, because the examiner, under the powers of the
17 Bankruptcy Code, does not have the power to institute
18 litigation on behalf of anybody. And there are plenty of
19 people around that are willing, ready and able to examine the
20 merits of this litigation.

21 So we think that the interested parties should
22 get together and try and see if they can resolve this issue.
23 And we would consent, just by their opposition in principle,
24 to this injunction, to a continuation of the injunction for
25 30 days, to enable them to do that.

1 It is possible, as Mr. Kruger has pointed out,
2 that 30 days might not prove to be enough. I hope it will.
3 If it isn't, we could certainly come back to your Honor and
4 suggest another extension. I know that there have been
5 a number of instances, Pittsburgh-Corning, for one, that
6 were involved where consent injunctions have been extended
7 for periods while people have attempted to work matters out,
8 and I don't see any reason why that would be unacceptable in
9 this case.

10 The Price motion, it seems to me there are
11 two aspects of it that I think first require some
12 clarification.

13 As I understand the Price case, it involves
14 both a class action on the merits against the debtor and
15 others for -- with respect to the Zonolite attic insulation
16 product. It also involves a fraudulent conveyance claim
17 against Sealed Air.

18 With respect to the second aspect of Price, I'm
19 not sure -- I don't think that the lift/stay has requested
20 that the fraudulent conveyance part be permitted to go
21 forward as part of the certification/discovery request. But
22 if it does, we would oppose that. We think that the -- that
23 fraudulent conveyance piece of that litigation should be
24 treated just like the Abner case and any of the other cases
25 that might be out there raising that type of claim would be

1 subject to the 30-day stay.

2 With respect to the other part of the lift/stay,
3 the class certification in particular, our view in the
4 matter, frankly, is that although we don't have a position on
5 the merits for certification at this moment, we do have a
6 position about who ought to decide it. And that is, we think
7 it ought to be decided by your Honor. And the primary reason
8 for that, frankly, is that, as has been pointed out, there's
9 going to be an interplay here between the proof of claim bar
10 date procedure set up by the bankruptcy rules and the notion
11 of doing anything on a class basis.

12 This case appears, and, again, this has been done
13 on such a rush basis that nobody, I think, other than the
14 authors of the pleadings themselves fully understand all the
15 ramifications. But this case appears to be seeking a
16 non-opt-out mandatory class certification in which they would
17 seek both notification to warn of the perceived dangers of
18 Zonolite and some form of damages.

19 Respectfully, I think there's a big difference in
20 a bankruptcy context between the possibility of under Rule
21 7023, for example, permitting class certification on a
22 notification program, if the Court determines that such is
23 needed, versus a single class claim in some mega-hundred
24 million, billion dollar amount for some. As their
25 information brief suggests, a million householders who want

1 nine to \$10,000 apiece to remove the attic insulation from
2 their attic.

3 While it's conceivable that, at the end of the
4 day, that might be the outcome of any class treatment of that
5 litigation, we're not prepared to say that that sort of a
6 decision with respect to the certification issue should be
7 made by a non-bankruptcy judge in Massachusetts, who isn't
8 going to be asked to take into account the limited funds
9 available to pay all creditors in deciding what types of
10 certification will or will not be permitted with respect to
11 the damage elements of that litigation.

12 So we would suggest that the -- that the Price
13 plaintiffs be permitted to, in the ordinary course, present
14 their case here in this Court, move for class certification,
15 everybody participate with respect to the bankruptcy aspects
16 of that, and move forward in that regard.

17 Thank you, your Honor.

18 THE COURT: Thank you. All right. You have
19 about two minutes.

20 MR. BERNICK: That's all I would like, your
21 Honor.

22 First, to clarify, I made reference to Special
23 Examiner and I'm informed by my learned counsel that we're
24 really -- that has special meaning under the code,
25 potentially. What I'm really talking about is the debtor

1 retaining special counsel so that the client would be the
2 debtor if the claim is pursued, and this is what we would
3 like a little bit more time to think about. And we would be
4 talking about a special counsel to the debtor, but it would
5 be counsel that is, in the sense, reportable to the Court,
6 including for the preliminary determination about the merits
7 of the claim itself. That's what we are looking for, is
8 accountability to the Court, that the claim is worth
9 pursuing, so it does not simply become a tool in the
10 bankruptcy. There's really a candid, up-front assessment
11 of merits to the claim.

12 Number two, the argument that has taken place
13 about the Price claim in particular demonstrates that the
14 issue in the minds of the people who are pursuing this matter
15 today is not simply who is in control of that litigation.
16 All the points made were substantive points: Should there be
17 special notice? Is the bar date adequate?

18 I would agree with Mr. Lockwood: Those are
19 matters that ought to be decided in this proceeding. Those
20 are matters that pertain to how the case is actually
21 pursued. They should not be decided by a judge who's not
22 intimately involved in this case. This is not simply a
23 question of who represents these people; it's a question of
24 notice and participation. Those are substantive and
25 procedural matters. We don't need to start all over, but the

1 matters should be placed before your Honor.

2 Finally, with regard to the futures, I hasten to
3 add it is whether the injunction ought to extend to the
4 claims. It is not property damage claims. The concern there
5 is all of these personal injury claims that seem to keep on
6 coming through the process and apparently are still coming
7 through with respect to Sealed Air. Those are personally
8 claims. They're not even the constituency that Mr. Baena
9 represents. That's where the concern lies: That people will
10 continue to pursue those future claims notwithstanding the
11 order that your Honor has issued.

12 So there is some merit to what Sealed Air has to
13 say on the personal injury claim side.

14 THE COURT: All right. Thank you.

15 Okay. With regard to this application for
16 preliminary injunction, I am going to enter an order.
17 And the order essentially is the order submitted by the
18 debtor.

19 What I am going to order is that the
20 prosecution of all actions are stayed and enjoined
21 pending a final judgment in this adversary proceeding or
22 further order of the Court, and also that the preliminary
23 injunction does not apply to pending motions for transfer and
24 the two cases cited in the proposed order, and that further
25 provide that nothing in the order will prevent anyone from

1 providing notice to insurance carriers or other appropriate
2 persons or entities that would otherwise exercise their
3 rights under the insurance policies provided they don't seek
4 reimbursement or payment under the policies without order of
5 the Court.

6 This order, by implication and expressly,
7 will overrule any objections and deny any competing
8 applications.

9 It is to be understood when the order is
10 entered with the findings that will accompany it that the
11 order in no way addresses any other matter.

12 For instance, it does not address the issue of
13 whether or not class certification will be undertaken or --
14 whether it is undertaken or not, whether it will be done here
15 or in Massachusetts. It implies nothing about the California
16 litigation. What it simply does is enjoin, so that the Court
17 and the interested parties can move forward to get the
18 litigation that accompanies this bankruptcy in some sort of
19 order.

20 All right. I see the Trustee has arrived.

21 MR. CHEHI: Your Honor, Mark Chehi for Sealed
22 Air.

23 Just one quick question: Does the scope of
24 the injunction then extend to the future filed or future --

25 THE COURT: Does not extend to future

1 litigation. I am going to make a finding in the findings
2 section of the order at this time that it only pertains to
3 filed cases and/or pending cases, but doesn't foreclose the
4 consideration of whether cases that may be filed or
5 contemplated be filed should be enjoined in the future.

6 MR. CHEHI: So it's without prejudice to the
7 debtor or --

8 THE COURT: Or any other party.

9 MR. CHEHI: Thank you, your Honor.

10 MR. SPRAYREGEN: Your Honor, the U.S. Trustee has
11 arrived, but we would actually like to come back to that Item
12 6 after we move forward. Hopefully, we'll try to find a way
13 to resolve that before we get back to it.

14 THE COURT: All right.

15 MR. SPRAYREGEN: We would then be prepared to
16 move on to Item 10 on the agenda letter, which is the
17 debtors' emergency motion for interim and final orders for
18 DIP financing.

19 Your Honor, there were, in the course of events
20 of this DIP, we originally had asked at the interim hearing
21 on the first day of the case before Judge Newsome for a
22 hundred million dollar interim DIP. We thought it would go
23 out about 30 days. We ended up with \$50 million interim for
24 15 days. We ended up back before your Honor on April 18 and
25 extended that out to today at \$100 million, a second interim

1 order.

2 In the interim there was an April 25 new
3 objection deadline established to the final DIP. There were
4 two objections received, one of which we resolved. One of
5 the objections was by the Official Committee of Property
6 Damage Claimants, in essence having some concerns about
7 making sure that they receive notice of things and concern
8 about what priorities would be in the event of Chapter 7.
9 We've made some changes to which I understand they've agreed
10 to the proposed final order, and that would resolve their
11 objection.

12 So that would leave the objection of Credit
13 Lyonnais, your Honor, and we have had a number of
14 conversations with them in an attempt to resolve that
15 unsuccessfully. I'm not sure what's left of their
16 objection.

17 THE COURT: Let's hear the objection.

18 MR. SPRAYREGEN: Thank you.

19 THE COURT: Thank you.

20 MR. MONACO: Good morning, your Honor. Frank
21 Monaco for Credit Lyonnais. I'd like to introduce and move
22 the admission of my co-counsel of Jeffrey Glatzer. He's
23 admitted in good standing in the Bar of New York and
24 practices in the Southern District of New York in Federal
25 Court.

1 THE COURT: Thank you. I will grant the
2 application. Welcome.

3 MR. GLATZER: Thank you, your Honor.

4 Your Honor, we represent Credit Lyonnais, which
5 is a prepetition creditor of the debtor under bank
6 facilities, which aggregate at about \$500 million. They were
7 in one of the \$250 million facilities, and there were about
8 \$10.4 million.

9 When we saw the application for DIP financing,
10 we read it as everybody else did and discovered not in an
11 application, but in the agreement that there was provision
12 for permitted acquisitions.

13 That came on the heels of discussions prepetition
14 that the lenders were having with the debtor with regard to a
15 facility of about \$200 million that never got consummated
16 because of the filing of the petitions, during which time the
17 debtors were talking about conducting and taking acquisitions
18 in Europe mostly in the near future, this year and next year,
19 I think, to the tune of two or \$300 million. It was on their
20 radar screen.

21 When we discovered the -- that they were
22 intending or retaining the right to make application to the
23 Court in the future for permitted acquisitions, we wanted to
24 find out what they actually needed of a DIP financing, which
25 would be a superpriority administrative expense, to, in our

1 view, preserve the estate apart from the acquisitions,
2 because we did not understand how acquisitions fit into a DIP
3 financing, which is ordinarily for the -- to preserve the
4 estate and to run the business, not to engage in
5 acquisitions.

6 We could not discover it from the motion papers
7 and we, through informal discussions and correspondence with
8 the debtors, have gotten some information. I think the
9 debtors are prepared to show the Court some of that
10 information today.

11 It appears that in their worst-case analysis in
12 the next two years, they might need about \$160 million of the
13 DIP financing, and we understand that is for ordinary
14 expenses that a DIP financing would be used for, for
15 preserving the estate, running the business, and that there
16 is, therefore, with the \$250 million DIP, approximately \$100
17 million or \$90 million that we assume are potential --
18 potential for permitted acquisitions.

19 We just don't agree that that is an appropriate
20 use of the DIP and that even allowing for a cushion from the
21 \$160 million that they have in their worst-case analysis of
22 use of the DIP in the next year or so, that \$200 million
23 would be apparently -- should be adequate.

24 And if they -- and they criticize that or object
25 to our discussion that they were -- that they were sort of

1 preordaining the use of the DIP for these uses despite the
2 fact that they have to come back to the Court. But, in fact,
3 if they have the financing already pre-approved in the DIP,
4 they are setting up the structure for the use of the DIP for
5 these long-term investments.

6 Coming from New York, you know, years ago New
7 York got into a great deal of financial trouble by using
8 short-term borrowings for long-term investments. This is the
9 kind of thing that we think is -- has potential here.

10 Furthermore, the money and the acquisitions are
11 going to be -- are going to be of nondebtor entities. They
12 contemplate buying companies in Europe, and they have
13 informed our client that in the European subsidiaries, which
14 are nondebtors, there are about \$100 million cash now and
15 more expected in the future. None of this will become
16 collateral to the estate directly. Maybe they would get some
17 stock of some of these companies, but under a variety of
18 rules the most they could get is a percentage of the stock,
19 and the stock gives you a net worth of a value of company,
20 but not the hard assets.

21 So all of this would be layered on the debtor
22 despite the fact that the assets would be outside of the
23 estate. And there appear to be assets outside of the estate
24 at which they could use for these purposes.

25 So, therefore, we think that either the DIP is

1 too large, \$250 million, because it's based upon the
2 permitted -- the contemplation of permitted acquisitions, or
3 they just shouldn't go ahead with the acquisitions. That's
4 our objection.

5 THE COURT: All right. Thank you.

6 MR. SPRAYREGEN: Your Honor, we did file a
7 response, a written response to the objection, and an
8 affidavit from our Chief Financial Officer, Mr. Robert
9 Torolla.

10 I'm not sure how the Court exactly wants to
11 proceed. We do have him in court today, ready to testify as
12 to what was in the affidavit and any other matters. We also
13 have Miss --

14 THE COURT: You can just argue the affidavit.

15 MR. SPRAYREGEN: We can do that, your Honor.

16 THE COURT: And your position.

17 MR. SPRAYREGEN: Your Honor, in essence, the
18 Credit Lyonnais, which is about two percent of the
19 prepetition unsecured facility, is questioning the business
20 judgment of the debtors in the DIP loan that the debtors
21 obtained.

22 We laid out in very much detail the efforts the
23 debtors went to to obtain the DIP loan prior to the filing of
24 these Chapter 11 cases. This DIP was actually very heavily
25 shopped among a number of financial institutions and, as a

1 result, priced quite favorably to the debtors.

2 In addition, the DIP has provisions in it
3 that permit these debtors which come into these cases
4 in an unusual position as compared to most debtors that we
5 see in bankruptcy cases. That is, very strong operating
6 company throwing off large amounts of cash in certain
7 circumstances.

8 And because these are stronger operating
9 companies than we ordinarily would see, we negotiated a
10 different DIP. That by no measure, though, takes away from
11 the fact that without one acquisition ever being done, and
12 the counsel is correct, we could never do anything like that
13 without coming before the Court, in any event, with all
14 parties here having an opportunity to object and have a
15 position on it. But without one acquisition being done, we
16 would be asking for the same size DIP. That is the \$250
17 million.

18 The business judgment of the debtors is that even
19 accepting the facts that the objectors lay out, that is that
20 under sort of a reasonable worst case, the DIP within two
21 years would go up to \$180 million, to have that amount of
22 room under a DIP we think is entirely reasonable. And, in
23 fact, it would be irresponsible of the debtors to put this
24 company in a position where we literally have used every
25 available penny of credit, because what happens, and this is

1 laid out in the affidavit in our objection, creditors well
2 understand the debtors' financing situation.

3 And they are not looking at the fact that we --
4 what will happen in two years when they are dealing with us.
5 They're looking at how we are today. And if they are seeing
6 that it is very skinny, that is, we may not have sufficient
7 financing to bring us through these proceedings, it
8 fundamentally alters the way that they do business with us
9 and alters our cost of doing business with them or even doing
10 business with them.

11 So the debtors' very strong business judgment
12 is that this is a reasonable amount of money, the \$250
13 million, and that it's necessary to preserve the assets and,
14 hopefully, enhance the assets, ultimately, and that the idea
15 that we should have just barely enough is really not the
16 standard that DIP financing is subject to.

17 Number of practical points also. This is
18 disclosed in the papers. This is a DIP that is underwritten
19 by the DIP lender but will be syndicated to a number of
20 parties. And in the syndication, all of those parties accept
21 whatever the terms of the DIP are.

22 The idea that we should excise certain provisions
23 of the DIP, like the provision permitting acquisitions and
24 then come back some other time to deal with it is
25 fundamentally impractical, because then the debtors would

1 have to be in a position to go out to a DIP that is now
2 syndicated and ask the new Bankruptcy Court, which does not
3 exist at the moment, to approve whatever this amendment will
4 be at that point in time.

5 What that does again, I'm not sure the DIP lender
6 could accomplish that, but it fundamentally again alters the
7 debtors' flexibility in operating its business, and if there
8 are opportunities to enhance the value of the assets, again,
9 subject to coming on a motion before this Court with all
10 parties to be heard on it, the debtors would be in a position
11 with this DIP to act on those opportunities, again, without
12 that flexibility in this current DIP and having to find
13 financing at a later time. That is a completely different
14 kind of situation in looking at how you are going to operate
15 your business going forward.

16 We also note in the papers that the cost savings
17 suggested by the suggestion that the DIP should be 50 or \$100
18 million lower is really throwing the baby out with the bath
19 water. That is, the cost of this DIP is about, I think it's
20 three-eighths of a percent.

21 I'm looking for the number. I apologize. But
22 it's very de minimis, and so we would be talking about saving
23 the estates, if we cut the DIP by \$100 million, a few hundred
24 thousand dollars.

25 We would suggest that that would be a very bad

1 business decision for these debtors to save that small amount
2 of money and the consequent negative impacts on its
3 flexibility, not just with respect to potential acquisitions,
4 but with respect to running the business.

5 As we state in the affidavit, the DIP now is
6 already drawn up to about \$75 million. And the debtors
7 have -- do have an extreme need for that to continue and that
8 availability to continue going forward.

9 So with that, your Honor, we would ask that the
10 objection be overruled, and would note, and do think it's
11 quite important, there are obviously a number of Official
12 Committees in this case, and I do think it's important, the
13 lack of objection of those parties and the reasonableness of
14 the amount of the DIP and the, ultimately, the protection of
15 the main thing that seems to be objected to by the objector,
16 this acquisition issue, is really for another day. That is
17 much speculation about buying something in Europe and whether
18 it would be subject to control over the Court.

19 If we ever bring a motion, those are all issues
20 that can be dealt with at that point in time, and it really
21 is not only inappropriate, but almost impossible to deal with
22 these hypotheticals at this point in time, and in our view
23 don't need to be dealt with right now. We can deal with that
24 when and if it ever occurs.

25 Thank you.

1 THE COURT: Thank you.

2 MR. RASKIN: Your Honor, Robert Raskin for the
3 Official Creditors Committee.

4 We had several concerns with the DIP order that
5 have been addressed by the debtor and the bank, and therefore
6 we did not object to the application.

7 Your Honor, with regard to the permitted
8 acquisition issue, we, of course, would prefer that
9 that was excised from the DIP. That was not the debtors'
10 business judgment. That was not the package that was before
11 us.

12 Having said that, your Honor, not objecting to
13 the DIP, with the preservation of all rights in the event the
14 debtors do come back to this Court for authority to use that
15 out in the DIP. And so we are just reserving all rights with
16 regard to what permitted acquisitions are appropriate in the
17 future. I don't think the debtor is doing anything here
18 today to prejudice our rights. The permitted acquisition
19 does say, "Subject to Bankruptcy Court approval."

20 THE COURT: All right.

21 MR. GLATZER: May I make one comment?

22 THE COURT: Sure.

23 MR. GLATZER: Thank you.

24 Just one response to Mr. Sprayregen. With regard
25 to vendors' view of the company, based upon the magnitude of

1 the DIP, it seems to us it would be unlikely that the vendors
2 would view the potential use of the DIP for permitted
3 acquisitions and giving them comfort as to whether they're
4 going to be supplying this company or not. We think a \$50
5 million cushion from their worst-case analysis, which would
6 leave a DIP of 200, would -- I understand the business
7 judgment. I think it's the preservation of the estate under
8 503 of the Bankruptcy Code.

9 Also, on an issue of notice, what happens in
10 these cases, generally, you know, a deal is cut and then, all
11 of a sudden, you get ten days' notice that there's going to
12 be a motion or a hearing to approve something, and getting
13 information, including when the financing concept is
14 preordained, and we think leaves it in a, you know, in an
15 uneven playing field in terms of trying to address the issue
16 at that time.

17 So if the Court is going to permit this, which we
18 object to, we would hope that there would be some imprimatur
19 that they must give 30 days notice of these acquisitions so
20 people can have sufficient opportunity to review them,
21 understand them, and then address them at that time.

22 Thank you.

23 THE COURT: All right. Thank you.

24 I'm going to overrule the objection, finding that
25 the grounds of objection do not go to the standard applicable

1 to the granting of such an order in that it does not attack
2 either the principle with regard to business judgment or that
3 the funds are for the preservation and operation of the
4 debtor.

5 What the objection does go to is the acquisition
6 provision, which has not been implemented, and is subject to
7 review by the Court, as the debtor understands. That
8 provision in and of itself in the context of this bankruptcy
9 I conclude does not meet the standard that would support an
10 objection, and therefore I'm going to overrule it and enter
11 the order as presented.

12 MR. SPRAYREGEN: Your Honor, we do have
13 a proposed order that do take into account both the
14 Creditor Committees and the Property Damage Committees
15 suggestions.

16 THE COURT: And you will be mindful of the
17 one point that was made that carries some merit, which
18 is if you're about to engage in a large acquisition, that
19 some sort of adequate notice so we don't have to come in
20 in one day, and that they'd have time to look at the papers,
21 would be appropriate. I don't know if it's 30 days. I don't
22 know if it's five days. But it's some amount of time that
23 permits a fair review of whatever the application is going
24 to be.

25 MR. SPRAYREGEN: Your Honor, yes, we will

1 be quite mindful of that. Obviously, even just a short
2 365(d)(5) sale requires notice. We would do everything we
3 can.

4 THE COURT: Thank you.

5 MR. SPRAYREGEN: Your Honor, that brings us to
6 Item 11 on the agenda letter, which was the reclamation
7 procedure motion.

8 Your Honor, there was one objection to that
9 motion. That actually has been resolved really through
10 informal communications, and there's no proposed change to
11 the order that was attached to the motion, so that objection
12 has been resolved, and we would ask that the order be
13 entered.

14 THE COURT: All right. We'll do that.

15 MR. SPRAYREGEN: And I have extra orders here, if
16 I can approach.

17 THE COURT: Sure.

18 (Mr. Sprayregen hands documents to the Court.)

19 MR. SPRAYREGEN: Next is Item 12, your Honor,
20 which was the motion for reconsideration of the first-day
21 order concerning the essential trade.

22 If the Court recalls, Judge Newsome had entered
23 an order actually more expansive than the debtor had
24 requested, authorizing the payment of all of the debtors'
25 prepetition trade in the amount of about \$35 million.

1 The debtors have requested essential trade capped
2 at about four and a half million dollars.

3 The movants raise the issue of should that 35
4 million be reduced. I'm happy to say, your Honor, again,
5 based on a number of informal discussions among the parties,
6 we have resolved that issue, basically a point in between the
7 four and a half million, actually a point far closer to the
8 four and a half million than the 35 million. And it was
9 basically, as I reported at the last hearing, we were
10 unfortunately no longer able to live at the four million due
11 to the changed circumstances.

12 Through discussion with the Creditors Committee,
13 we did resolve this objection, and we have a proposed
14 stipulation to present.

15 THE COURT: All right. Pass it up. I will
16 approve it.

17 (Mr. Sprayregen hands documents to the Court.)

18 MR. BAENA: Your Honor, may we be advised of what
19 the new number is?

20 THE COURT: You didn't get a copy of the proposed
21 order?

22 MR. BAENA: No, sir. If I did, I was here,
23 and --

24 THE COURT: We'll get it to you right now.

25 MR. BAENA: -- didn't see it.

1 THE COURT: No problem.

2 MR. RASKIN: Your Honor, I apologize to Mr.
3 Baena. We have to work out our communications a little
4 better. Some of the papers were not served us and we did not
5 include them in these negotiations. We'll work out those
6 issues outside the province of the Court.

7 The debtors had had previously paid \$5.6
8 million. I will give round numbers. In addition to that
9 amount, the stipulation called -- allows the debtor to spend
10 an additional \$4.9 million plus. To the extent they get any
11 deposits back from any of their vendors, prepetition deposits
12 back, they can expend those funds.

13 In addition to those amounts, your Honor, the
14 stipulation authorizes the debtor to allow vendors to set off
15 \$8 million of prepetition deposits.

16 And that is the general thrust of the
17 stipulation.

18 THE COURT: All right. Thank you.

19 MR. SPRAYREGEN: Your Honor, that gets to Item 13
20 on the agenda, but I believe the Court actually for today, at
21 least, has dealt with that. That was the automatic stay
22 motion.

23 THE COURT: Yes.

24 MR. SPRAYREGEN: So that would leave going
25 back --

1 THE COURT: Just for the record, that application
2 is denied.

3 MR. SPRAYREGEN: That would leave Item 3 on the
4 agenda, which was the Ordinary Course Professional Objection
5 of the U.S. Trustee.

6 I would ask Ms. Jones to report on that, because
7 there have been some conversations on that while I was up
8 here.

9 THE COURT: All right. Thank you.

10 MS. DAVIS JONES: Your Honor, if I may, I would
11 back up a little further, and with respect to Matters 1, 2
12 and 4 and 5, your Honor, we do have the orders on that, if
13 that is procedurally easier for the Court than going through
14 the whole --

15 THE COURT: Sure.

16 MS. DAVIS JONES: -- certificate of no
17 objection.

18 THE COURT: You can just pass them up.

19 MS. DAVIS JONES: Thank you (handing documents to
20 the Court).

21 Your Honor, then as to matter No. 6, with the
22 ordinary course professionals, this had drawn an objection
23 from the U.S. Trustee, and we have spoken with Mr. Perch to
24 try to resolve those, and there are four commitments that we
25 have agreed to make, and I will make them known on the

1 record.

2 First of all, we will be providing additional
3 information to the U.S. Trustee as to what particular
4 professionals will be retained to do particularly what
5 they're doing. I'm going to provide that by the end of this
6 month.

7 Your Honor, also we've committed that the
8 ordinary course professionals that are on our current list
9 will file an affidavit of disinterestedness within 30 days of
10 that professional's start of providing services
11 post-petition.

12 Also, your Honor, you may recall in the motion
13 there's a provision to allow the debtors to add additional
14 OCP's, as we call them, should that be necessary, as we go
15 down the road. If we do that, we will also make sure that
16 they file affidavits within 30 days of their start date of
17 providing services post-petition.

18 And, your Honor, lastly, we will -- we do
19 represent that we will not be using essential trade money to
20 pay the OCB's.

21 Your Honor, I think with that, we've resolved the
22 objections.

23 MR. PERCH: Good morning, your Honor. Frank
24 Perch for the United States Trustee.

25 I appreciate the Court's indulgence in moving

1 this to the back of the agenda, and Ms. Jones is correct
2 with those modifications and clarifications. And subject to
3 those provisions being put in the order as necessary, the
4 U.S. Trustee has no objection.

5 THE COURT: All right. Thank you, Mr. Perch.

6 MR. PERCH: Thank you, your Honor.

7 MS. DAVIS JONES: Your Honor, if I may approach?

8 THE COURT: Yes.

9 MS. DAVIS JONES: Your Honor, then, with respect
10 to Matters 7 and 8, as the agenda indicates, there were no
11 objections filed to those, but we do have a couple changes
12 that we've made on proposed orders to be submitted to the
13 Court.

14 Your Honor, with respect to the administrative
15 compensation order, we have just added language to clarify on
16 Page 5, the ordered paragraph that provides, "Ordered that
17 each member of any Committee, when and if appointed, be
18 permitted to submit statements of expenses and supporting
19 vouchers to counsel to any such Committee."

20 We've added the proviso, "Including individual
21 Committee member counsel expenses but excluding such
22 counsel's fees."

23 Your Honor is quite aware of that issue from the
24 First Merchants versus Bradford decision. This is the
25 language that has been agreed to by the Trustee's Office,

1 that goes into all these orders to make clear that there is
2 no surprise, if you will, and that somehow counsel fees are
3 just being accumulated on a monthly basis and being paid at
4 an 80/20 rate, and nobody really focuses on them.

5 This is to specifically provide if there
6 are counsel to particular Committee members who are
7 seeking reimbursement of fees, that they bring that on by
8 particular application that gives the trustee and the
9 debtors and other interested parties the opportunity to
10 respond to that.

11 Your Honor, the utilities motion also had
12 a change in the proposed order that we would give to the
13 Court. And that is to provide that if a utility company
14 makes a timely additional insurance request that was provided
15 in the motion that the debtor believes is reasonable, the
16 debtor be entitled to reply with the additional insurance
17 request without further order of the Court.

18 What we've added after giving notice to counsel,
19 the Official Committee's intent to comply with additional
20 request and allowing two business days after such notice has
21 been given to permit counsel to the Creditors Committee to
22 object to the debtors' compliance with such additional
23 assurance request.

24 Your Honor, with those changes, both in that
25 order and in the one I just discussed, I'd like to submit

1 them.

2 THE COURT: Sure.

3 (Ms. DAVIS Jones hands documents to the Court.)

4 MS. DAVIS JONES: Your Honor, I believe that's
5 all we have on the agenda.

6 THE COURT: All right.

7 MR. SULLIVAN: Your Honor --

8 THE COURT: Yes?

9 MR. SULLIVAN: Excuse me, your Honor. Bill
10 Sullivan on behalf of Paul Price.

11 Your Honor ruled on the motion for relief from
12 stay and also on the injunction, and I just rise for a point
13 of clarification.

14 In issuing your injunction where you indicated
15 that it did not decide whether you or the Massachusetts
16 Court, whether this Court or the Massachusetts Court would
17 decide the issue of class certification, and therefore can
18 we get a clarification that the denial of the motion for
19 relief from stay, which we felt was appropriate to bring
20 today since we were considering the injunction, is without
21 prejudice so that we can renew that issue and bring it before
22 your Honor at the appropriate time as to where this class
23 issue --

24 THE COURT: The only thing that happened here
25 today was litigation was enjoined. Objections were overruled

1 and applications denied that were implicated by the decision
2 to enjoin litigation.

3 Now, whatever that means, it means.

4 Lawyers always ask you, it's not without
5 prejudice. Then you find out what they really meant when
6 they present the application is something much broader.

7 It's pretty clear. We enjoined litigation
8 today. The motion to lift was denied. And it's without any
9 other decision or issue, a decision being made or issue being
10 addressed.

11 But while we're on this -- so that's my answer to
12 clarify. I don't do that well, so I stay away from it.

13 If I could, I have a pretrial conference I was
14 going to take during the break. We're finished on the agenda
15 for what we have today. And i don't want to hold these folks
16 much longer. But if you could, since we were going to be
17 here until 12:00 o'clock anyway, if the parties -- if counsel
18 that have an interest and spoke with regard to the motion for
19 preliminary injunction would stay, I'd like to hold -- it
20 will be on the record, a brief conference with you when I'm
21 finished with the pretrial conference, to give you some
22 guidance going forward, that may help you in the 30 days
23 while you're in discussions. All right?

24 Anything further?

25 MS. JONES: No, your Honor.

1 THE COURT: We'll be in recess.

2 (Court recessed at 9:45 a.m.)

3 - - -

4 (Proceedings commenced in the jury room with the
5 Court and counsel present beginning at 10:12 a.m.)

6 THE COURT: All right. And this is on the
7 record, if anybody wants a copy of it.

8 You know, now we have an injunction in
9 place about -- for about a month, and the bankruptcy,
10 obviously, focuses on litigation. You know, judges
11 really aren't suited, believe it or not, to strategize
12 lawyer-managed litigation. I sit on panels and I know some
13 judges talk about how well they do it, and I don't think we
14 ever do it well. It's kind of like lawyers managing their
15 office. You don't really do it well, even though you think
16 you do. That's why you have office managers now and folks
17 like that.

18 In this case, I'm more than ready to receive
19 papers and make decisions that are required. But there is a
20 line that crosses over into the idea of managing the case.
21 And we've all been exposed to the orders that go into the
22 multi-district litigation cases. And there's a book about
23 that that I could go get in my library, and it has the forms,
24 and I just have to fill in your case name and a few other
25 things, and I could look like a judge that knows how to

1 manage a case to the uninitiated. But to people who really
2 try cases, you would know that I got it from the form book
3 that I got from Washington.

4 What I would really like to see you do, and the
5 purpose of me having you in is, you are probably going to be
6 litigating in Delaware. And I have not made any decisions,
7 but it's a bankruptcy case, they're interwoven. Unless
8 there's some persuasive, convincing force or reason to send
9 you around the world, you are probably here. And what you
10 really ought to focus on is what you want decided and when
11 you want to get to trial. It will make a lot more sense in
12 the context of not only the litigation that's out there, but
13 of the bankruptcy also.

14 And if you worked at that, I am not going to
15 disagree with anything, if it's an agreement, because I'm
16 going to accept your preference. And what I am going to do
17 is work to get you timely decisions and have enough lead time
18 to be able to read the papers thoroughly and then get you and
19 ask you questions.

20 That's what I wanted to tell you. And I think
21 you'll spend your time more productively focused there than
22 anywhere else.

23 Now, if you can't agree, and you think there's
24 some strong force or convincing reason why you shouldn't be
25 working on how you're going to get these cases resolved, you

1 can come tell me that and I have an open mind about it. But
2 I thought it would be good if you knew what my perspective
3 was, at least to get you started in your discussions.

4 And in the litigation, if it occurs in Delaware
5 or if it goes somewhere else, we're still going to have to
6 move it on a timely basis, and a lot -- and, you know, I
7 don't like the term rocket docket, and we're not that. But
8 we do try to move fairly expeditiously, so that people get
9 results.

10 Typically in this court, cases of the nature
11 you're talking about would realistically be out of here in 24
12 to 30 months. In other words, if they just came in, given
13 the idea there would be some extended discovery and some
14 motion practice, and they could be out as early as 16, 18
15 months. So you ought to focus on that, too, as you plan how
16 you would conduct the cases.

17 MR. BAENA: Your Honor, is it inappropriate to
18 inquire whether you have a perception you wish to share about
19 the role of the Committees in these cases?

20 THE COURT: See, that's a substantive issue.
21 That's something I should decide. I'm only talking about
22 mechanics.

23 MR. BAENA: Right.

24 THE COURT: And that's the kind of thing I
25 separate out that ought to be -- because I don't really have

1 a preference.

2 I actually read somewhere where they don't think
3 I'm a plaintiff or defendants' lawyer, but they think my
4 heart is with the plaintiff. I have no clue.

5 MR. RASKIN: We're going to stick around and see
6 how you sentence these people.

7 THE COURT: I was a prosecutor, but I also was
8 Assistant Public Defender for six years. I had three death
9 penalty cases I tried and then I became a prosecutor and I
10 had to prosecute death penalty. So I try to keep all of that
11 out of it and just focus on making -- I just said that I'm
12 making informed decisions and get you answers, so, no, I
13 don't have a preference on that. But that's something you
14 could work out. But I would be willing to decide it in the
15 short run, so you would get answers to that so you would get
16 on your way.

17 Somebody else said something when you brought
18 that up. The folks from the Massachusetts case about -- I
19 don't think they -- did they use the word disenfranchise?

20 MR. FISHMAN: I think I probably used that word,
21 your Honor.

22 THE COURT: Was it you?

23 MR. FISHMAN: Yes.

24 THE COURT: This is Delaware.

25 MR. FISHMAN: I come from Chicago.

1 THE COURT: But feel -- you know, I'm wrong as
2 much as I'm right, but everybody will get a shot at, you
3 know, being open.

4 And the other thing I wanted to tell you was,
5 time has become very important in this court, just because of
6 the filings that are coming here. And when we put time
7 frames on you, it's not really to cut you off, which is a
8 form of disenfranchising litigants. You have to understand,
9 we've read the papers and it's really a chance for you to
10 enhance or for us to get something straight. We're not
11 trying just to be arbitrary.

12 But there's really not a lot of time to be set
13 aside, particularly with the trials we have to schedule.

14 So does anybody else have any questions? I will
15 be happy to --

16 MR. BERNICK: The purpose of the informational
17 brief was to lay out the elements we think we have to
18 litigate, and we'll be really very diligent in raising issues
19 in a formal way very soon to try to create what I understand
20 your Honor would like, which is a structure of what's going
21 to get litigated, what are the basic tracks of litigation and
22 what is the process going to be for getting that to happen.

23 And we will -- we'll satisfy our burden to
24 initiate those discussions. We'll do it obviously informally
25 with the Committee in advance. But we'll put those matters

1 to your Honor very promptly in this case, so at least people
2 will have something to shoot at and we can get the process
3 under way.

4 MR. RASKIN: Just from a bankruptcy lawyer's
5 perspective once again, that's great in the litigation. This
6 is a bankruptcy case and I think we ought to spend some time,
7 especially since we're talking about cases that are going to
8 take a couple years to try. It's worth six months or a year
9 to see what you can resolve consensually or you just have to
10 start teeing up trial and spinning meters, and so that's
11 where we're coming from.

12 THE COURT: Well, we have two weapons in our
13 arsenal here in Delaware in the District Court. One is a
14 firm trial date. Once we set it, it's unusual to go off it,
15 unless there is some real purpose to doing it.

16 And the second is we have a Magistrate Judge that
17 is excellent at mediating, and we have an open mind about
18 bringing in outside mediators as long as the parties, you
19 know, have the will to have a fair discussion toward reaching
20 some sort of a consensual agreement.

21 And I am willing to insert the Magistrate Judge
22 where it appears that parties have that kind of a will and
23 want to talk to someone who's very good at that. She has a
24 very detailed process she goes through. She is an
25 experienced litigator. And she spends a lot of time with the

1 folks going back and forth, first trying to understand the
2 position and then trying to get a recommendation or at least
3 folks moving toward some goal.

4 So if you could do that, that's great, and I will
5 be willing to work with you to get that done.

6 I don't think my job is to push settlement, to
7 advocate settlement. My job is to make decisions and to get
8 you to trial. I'm the screening mechanism for the Court of
9 Appeals. And I'm good at that.

10 The good news is -- off the record.

11 (Discussion held off the record).

12 THE COURT: But what I'm going to work on is
13 getting you to a trial, if you are going to be here. But we
14 have resources available. And actually, we have some folks
15 that are mediating both with Delaware backgrounds and from
16 out of town now in some cases, and they've done an excellent
17 job of parsing out some issues and getting some parts of
18 cases voluntarily resolved. But you have to want to do it.
19 If you don't, litigation is good. Bad for the client;
20 right? Running that clock and all.

21 MR. SPRAYREGEN: Well, we've resolved a lot of
22 these cases over the years by agreement. Certainly the
23 majority of the cases that we've had have been resolved by
24 agreement, and we're always interested in doing that, if we
25 can.

1 THE COURT: Good.

2 MR. LOCKWOOD: From my Committee's perspective, I
3 think in terms of expedition, the expediting the Zonolite
4 dispute would be a very good thing, because that is really
5 sort of -- it's unaccustomed representing the asbestos
6 personal injury people to be the small monkey in the room and
7 there's another bigger 800-pound gorilla around.

8 But the numbers that are being referred to in the
9 Zonolite stuff make them into the potential at least 800-
10 pound gorilla in this case, and yet the debtor asserts that
11 they're about a two ounce gorilla.

12 MR. BERNICK: Peter, let me assure you, you're
13 still the gorilla. Don't worry about it.

14 MR. LOCKWOOD: Maybe not the biggest gorilla.

15 THE COURT: At least you're not nasty toward each
16 other. But, see, that's the kind of thing you might be able
17 to agree in your discussions and come and say, If we can get
18 that case on in X amount of time, we could do all that for
19 you. Or you could say, We can't agree, but we think that's
20 what should be put before the Judge for a decision, whether
21 you get a 14-month trial date or 30-month trial date. I will
22 make that decision. That's the kind of discussion I would
23 hope you would have in the next 30 days.

24 If you can't resolve it, at least if you can join
25 that that is the issue, I can give you an answer.

1 MR. LOCKWOOD: Mr. Bernick is very good at
2 joining the issue, your Honor. You'll find he definitely
3 will put it right out there for us all.

4 THE COURT: Does anybody else have anything?

5 MR. BERNICK: Thirty days from now, do you want
6 us back to basically report on what we've come up with along
7 those lines?

8 THE COURT: Somewhere in the range of 30 to 45
9 days I thought you would get back and tell me where you are,
10 because I do want to keep it moving. It's not on the front
11 burner but it hasn't reached the back burner. And I don't
12 feel comfortable in cases until there's a course. And we
13 really don't have a course here. We kind of have a lot of
14 sentiment, a lot of ideas, a lot of thought, but we don't
15 have a real course.

16 And whether it's part of the case or all of the
17 case, I want to get it on a course, you know, wherever it is
18 or whatever has to be resolved. That's what we're supposed
19 to do. That's the job we're supposed to get done, so -- all
20 right.

21 Anybody else? Thank you very much. I appreciate
22 it.

23 (Conference concluded at 10:25 a.m.)

24

25

I hereby certify that the foregoing is a true
and accurate transcript from my stenographic
notes in the proceeding.

Valerie J. Duran

Official Court Reporter
U. S. District Court